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No. 94-630

In the Supreme Court of the United States

OCTOBER TERM, 1994

DWIGHT R. BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JOHN M. SMITH
Colonel, USA

LYLE D. JENTZER
Major, USA

MICHAEL E. MULLIGAN
Captain, USA
Appellate Government Counsel
Government Appellate Division
Falls Church, VA 22041-5013

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QUESTIONS PRESENTED

1. Whether petitioner was entrapped as a matter of law.

2. Whether the Drug Abuse Prevention, Treatment, and Rehabilitation Act, 21 U.S.C. 1101 *et seq.*, and implementing regulations, forbade military investigators from subjecting petitioner to an undercover investigation.

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OPINIONS BELOW

The order of the Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces) denying review (Pet. App. F1) is unpublished, but the decision is noted at 41 M.J. 77 (Table). The opinion of the United States Army Court of Military Review (now the United States Army Court of Criminal Appeals) is unreported. Pet. App. E1-E2. At an earlier stage of the proceedings, the Court of Military Appeals issued an opinion (Pet. App. D1-D18) that is reported at 38 M.J. 358,[1] and the Army Court of Military Review

[1] The petition's appendix does not set forth page numbers for this 18-page opinion. We have numbered the pages of the court's

issued an opinion (Pet. App. C1-C8) that is reported at 34 M.J. 846.

JURISDICTION

The judgment of the Court of Military Appeals was entered on July 7, 1994. The petition for a writ of certiorari was filed on October 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1993).

STATEMENT

Petitioner was convicted by a general court-martial of using cocaine and two specifications of distributing cocaine, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. On petitioner's initial appeal, the United States Court of Military Appeals set aside petitioner's conviction for using cocaine and remanded the case for reassessment of the sentence. Pet. App. D1-D18. On remand, the Army Court of Military Review ordered that petitioner be confined for nine years, that he forfeit all pay and allowances, and that his rank be reduced to Private E1. *Id.* at E2. The United States Court of Military Appeals denied further review. *Id.* at F1.

1. In late September 1989, Private Dwight Nolte and three other soldiers were caught smoking marijuana and were arrested. Following Nolte's arrest, a friend suggested to him that he should try to obtain leniency by offering his cooperation to the Criminal Investigation Division Command (CID). Nolte decided to take his friend's advice. Tr. 110-111.

On September 24, 1989, Nolte proffered his cooperation to the CID. When asked by CID agents if he knew anyone

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opinion "D1" through "D18" and we have used that pagination system in this brief.

who would "deal" cocaine, Nolte gave petitioner's name. According to Nolte, petitioner had discussed the possibility of dealing drugs with Nolte, and petitioner had lamented that he lacked enough money to do so. A few months earlier petitioner had also borrowed $10 from Nolte to buy some "crack." Tr. 111-112, 120, 176. While Nolte knew that petitioner had referred himself to the Army Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) at Fort Campbell, he did not share that information with the CID agents. Pet. App. C3; Tr. 110-112, 120, 176.

The CID registered Nolte as a confidential "source," assigned him to an undercover agent, and immediately sent him and the agent out together to attempt to purchase drugs from petitioner. Observing petitioner driving his car, Nolte waved petitioner down and introduced the undercover agent to petitioner as a student from the University of Nebraska. Nolte asked if petitioner would sell some crack to the agent. Petitioner replied "sure[,] no problem," and "[v]irtually instantly * * * hopp[ed] into Nolte's car and directed the agent and Nolte to a location in nearby Clarksville, Tennessee." Pet. App. D5; Tr. 113-114, 132-134, 180. Once there, the agent gave petitioner $20. Petitioner left the car and returned with approximately .04 grams of "crack" cocaine. During the return trip to Fort Campbell, petitioner discussed how he could obtain "crack" in the future and said that he knew that the supply of crack in Washington, D.C. was "real plentiful." Tr. 60-61; see also Tr. 113, 115, 138. Unbeknownst to Nolte and the agent, petitioner cheated the agent by keeping (and later smoking) some of the crack for himself. Pet. App. D5.

After the September 24, 1989, purchase, the CID asked Nolte to arrange another buy for the same agent. Nolte

explained to petitioner that the "student" was really a soldier who was interested in buying drugs, and he suggested to petitioner that they could "set up" the agent together and "take him" for a lot of money by arranging another "crack" purchase. Nolte lost touch with petitioner for a few days, but he eventually met with petitioner on October 5, 1994, when petitioner once again agreed to procure drugs for the agent. The transaction proceeded much as the first deal, except that petitioner smoked some of the crack in the agent's presence and he solicited more drugs from the agent, asking the agent to smoke with him. Petitioner was arrested upon his return to Fort Campbell. Pet. App. D6; Tr. 64-70, 116-118, 132.

2. At his court-martial, petitioner interposed the defense of entrapment. Petitioner testified that he first used cocaine in February 1989, and that he became addicted. Tr. 170-173. He claimed that he refused Nolte's requests to buy drugs three times before agreeing to the purchase on September 24, 1989. Tr. 174. Petitioner claimed that before he agreed to that purchase, he interpreted Nolte's gestures and eye and facial movements to mean that petitioner should "rip off" the agent by keeping some of the "crack" for himself. Tr. 181-183. Petitioner testified that he had "ripped off" people "a lot of times before" in similar distributions in which he participated with others. Tr. 184, 192.

The court-martial rejected petitioner's entrapment defense and convicted him of use of cocaine and two specifications of distribution of cocaine in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. Petitioner was sentenced to confinement for 20 years, total forfeiture of pay and allowances, reduction to the lowest enlisted grade and a dishonorable discharge. The convening authority

approved the finding and sentence.[2] The Army Court of Military Review affirmed the findings and sentence, except that it reduced petitioner's confinement to ten years. Pet. App. A2, D2. The Court of Military Appeals, however, summarily vacated the judgment and remanded the case to the Court of Military Review for further consideration in light of *United States* v. *Cooper*, 33 M.J. 356 (C.M.A. 1991). Pet. App. B1, D2.

3. Upon reconsideration, the Army Court of Military Review again affirmed petitioner's convictions and his sentence (as previously modified by the reduction of the term of confinement to ten years). The court noted that in *Cooper*, a registered informant told CID agents that the defendant was a drug dealer, but did not tell the agents that the defendant had enrolled in ADAPCP. The informant in *Cooper* then overcame the defendant's reluctance to revert to drugs, and persuaded him to procure drugs for an undercover agent. The Court of Military Appeals affirmed the ensuing conviction.

The Army Court of Military Review noted that the lead *Cooper* opinion, which was authored by Judge Cox, emphasized that the CID agents did not *knowingly* approach the defendant in violation of regulations designed to protect the confidentiality of the ADAPCP program, and that Judge Cox assumed that the knowing targeting of a recovering addict would violate due process. Pet. App. C6. The court also noted that, in a concurring opinion, Chief Judge Sullivan stated that the CID should be bound by the informant's knowledge of the

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[2] The "convening authority" is the commander who convenes the court-martial. The convening authority selects the court-martial members (who are analogous to jurors), directs that the accused be tried by the court-martial for the charged offenses, and conducts a post-trial review of the proceedings.

defendant's decision to seek treatment, but that the regulations that protect ADAPCP patients do not apply to offenses committed after a patient enters the program. *Id.* at C2-C3, C5-C6. The Army Court of Military Review then concluded that petitioner would lose under either approach, because the CID did not seek him out knowing him to be enrolled in the ADAPCP program, and because petitioner had already engaged in drug misconduct after entering the program. Moreover, the court noted that the record contained no evidence of official overreaching. "Nolte made only a single, simple, and perfunctory request to [petitioner,] whose compliance with the request was immediate and unhesitating. * * * He was clearly readily complaisant and we so find." *Id.* at C7.

4. The Court of Military Appeals affirmed petitioner's two convictions for distributing cocaine, but it reversed his conviction for using cocaine. The court remanded for reassessment of the sentence based on the remaining findings of guilt. Pet. App. D1-D18.

a. Speaking for the court with respect to the distribution counts,[3] Judge Cox first rejected petitioner's claim of entrapment. Judge Cox noted that there was no opportunity for Nolte to communicate any official inducement to petitioner, since Nolte was with a CID agent between the time he signed up as an informant and the time he and the agent asked petitioner for crack. Moreover, the evidence showed that petitioner readily agreed to sell the drugs immediately upon being asked. Pet. App. D4-D5. Because "[n]othing in the law of entrapment forbids the Government from merely asking

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[3] Chief Judge Sullivan and Judge Crawford joined Judge Cox's opinion insofar as it upheld the convictions on the distribution counts. Pet. App. D2.

someone to sell drugs," and because "[t]he instant record is replete with evidence of [petitioner's] pre-existing disposition and of the Government's lack of overreaching prior to the first transaction," Judge Cox concluded that "[t]he factfinder was entirely within its province in rejecting [petitioner's] entrapment claim." *Id.* at D7-D8.[4]

Judge Cox also rejected petitioner's claim that his prosecution violated statutory and regulatory provisions designed to protect the integrity of drug rehabilitation programs. First, Judge Cox noted that 42 U.S.C. 290ee-3(a) and 290ee-3(c), which mandate confidential treatment for drug treatment records and prohibit the use of such records in a criminal investigation or prosecution of a patient, are expressly made inapplicable to "any interchange of records . . . within the Armed Forces," Pet. App. D9, and that, in any event, "there is not the slightest indication in this record that any records of any drug-abuse-prevention function were ever disclosed to anybody." *Ibid.* Second, Judge Cox rejected petitioner's reliance on numerous regulations promulgated by the military and the Department of Health and Human Services that restrict the use of undercover officers or informants to investigate patients enrolled in a drug rehabilitation program. After reviewing the language of each regulation, Judge Cox concluded that those regulations prohibit law enforcement infiltration

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[4] Judge Cox also rejected petitioner's claim that the government's conduct violated the Due Process Clause of the Fifth Amendment, explaining that a due process claim "arises only in the context of shocking police abuse of an accused. In the instant case, the law enforcement agents merely asked [petitioner] if he wanted to deal, and he did. There was thus no abuse or mistreatment whatever." Pet. App. at D7-D8 n.6.

of rehabilitation programs, and the use of information collected by those programs for law enforcement purposes, neither of which occurred in this case. *Id.* at D9-D12.[5]

b. Speaking for the court with respect to petitioner's conviction for using cocaine, Chief Judge Sullivan concluded that the government improperly induced petitioner to use cocaine during the second sale to the undercover agent, because Nolte had offered petitioner cocaine to induce that sale and the CID agent allowed petitioner to smoke the cocaine. In Chief Judge Sullivan's view, those actions amounted to "outrageous government conduct" that violated petitioner's due process rights and precluded petitioner's conviction for using the cocaine. Pet. App. D13.

c. Judge Gierke dissented. While he agreed with Judge Cox's treatment of petitioner's entrapment claim, he would have reversed petitioner's conviction for distributing drugs on October 5, 1989 (in addition to the use conviction arising out of the events of the same date), because he believed that Nolte's conduct in offering petitioner drugs to induce his participation in that sale amounted to "outrageous government conduct" in violation of due process. Pet. App. D15-D18.

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[5] Judge Wiss concurred separately in the affirmance of the two distribution convictions, but he disagreed with Judge Cox's reasoning. As to the first sale, Judge Wiss concluded that the members of the court-martial necessarily "rejected [petitioner's] contention that Nolte had used cocaine as the carrot to induce a known cocaine addict to commit a crime that Nolte had no reason on earth to think that the addict otherwise would com[illegible]" Pet. App. D14. As to the second sale, Judge Wiss concluded [illegible] "[b]y then * * * [petitioner's] propensity to distribute already was established by the first transaction, so an entrapment defense in the usual sense was precluded." *Id.* at D15.

5. On remand, the Army Court of Military Review reassessed the sentence based on the remaining findings of guilt, and reduced petitioner's confinement to nine years. Pet. App. E2. The Court of Military Appeals denied further review. *Id.* at F1.

ARGUMENT

1. Petitioner first contends (Pet. 29-31) that under the concept of predisposition articulated in *Jacobson* v. *United States*, 112 S. Ct. 1535 (1992), and *Sherman* v. *United States*, 356 U.S. 369 (1958), he was entrapped as a matter of law. Petitioner is incorrect. Accordingly, further review of petitioner's factbound claim is not warranted.

Jacobson involved a sting operation in which the government repeatedly contacted the defendant over a two-and-a-half year period through various fictitious organizations and a bogus pen pal before the defendant accepted an invitation to purchase child pornography through the mail. Relying on the well-settled proposition that "[g]overnment agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute," 112 S. Ct. at 1540 (citing *Sorrells* v. *United States*, 287 U.S. 435, 442 (1932)), the Court concluded that the defendant had been entrapped as a matter of law into ordering the prohibited material. The Court reasoned that the government's prior contacts with the defendant "not only excited [his] interest in sexually explicit materials banned by law but also exerted substantial pressure on [him] to obtain and read such material as part of a fight against censorship and the infringement of individual rights." 112 S. Ct. at 1542. In those circumstances, the Court held, "[r]ational jurors could

not say beyond a reasonable doubt that [the defendant] possessed the requisite predisposition [to commit the offense charged] prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to [him]." *Id.* at 1543.

In *Jacobson*, however, the Court reaffirmed the longstanding principle that a defendant is not entrapped when government agents "merely afford opportunities or facilities for the commission of the offense," and that "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises." 112 S. Ct. at 1540. The Court explained:

> Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs, and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition. See *United States* v. *Sherman*, 200 F.2d 880, 882 (CA2 1952).

Jacobson, 112 S. Ct. at 1541. After viewing the evidence in the light most favorable to the government, as they were required to do, see *United States* v. *Collins*, 957 F.2d 72, 77 (2d Cir.), cert. denied, 112 S. Ct. 2285 (1992); *United States* v. *Akinseye*, 802 F.2d 740, 744 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987); *United States* v. *Ford*, 918 F.2d 1343, 1348 (8th Cir. 1990), the courts below correctly concluded (Pet. App. C7, D7-D8) that Nolte and the undercover CID agent simply offered petitioner an opportunity to participate in a criminal venture, for which petitioner's past comments and actions suggested

his ready amenability. Petitioner's immediate acceptance of that opportunity demonstrates that he was an "unwary criminal," not an "unwary innocent," see *Jacobson*, 112 S. Ct. at 1537 (quoting *Sherman* v. *United States*, 356 U.S. 369, 372 (1958)), and that he was therefore not entrapped as a matter of law.[6]

2. Petitioner also contends (Pet. 32-37) that his distribution convictions should be set aside, because the Drug Abuse Prevention, Treatment, and Rehabilitation Act, 21 U.S.C. 1101 *et seq.*, and its implementing regulations, forbade military investigators from subjecting petitioner to an undercover investigation. Petitioner offers no argument to rebut the Court of Military Appeals' careful textual analysis of the provisions on which he relies, and he does not suggest that the lower courts are in conflict on the proper interpretation of those provisions. Nor does petitioner offer any persuasive reason for his assumption that those statutory and regulatory provisions authorize or

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[6] For similar reasons, petitioner's reliance on *Sherman* v. *United States*, 356 U.S. 369 (1958), is misplaced. *Sherman*, like this case, involved a defendant who had at some point sought treatment for narcotics addiction. In *Sherman*, however, "the undisputed testimony of the prosecution's witnesses" (*id.* at 373) established that the defendant was first persuaded to abandon his rehabilitation efforts by the informant, who was also enrolled in the program while working for the law enforcement agents and who falsely and repeatedly claimed that he needed the drugs "because he was not responding to treatment." *Id.* at 371. "Not until after a number of repetitions of the request, predicated on [the informant's] presumed suffering, did [the defendant] finally acquiesce." *Ibid.* Thus, in *Sherman*, unlike this case, the government's own evidence established that "[o]ne request was not enough, for * * * additional ones were necessary to overcome, first, [the defendant's] refusal, then his evasiveness, and then his hesitancy in order to achieve capitulation." *Id.* at 373.

contemplate the dismissal of a criminal prosecution even when they are actually violated. Cf. *United States* v. *Caceres*, 440 U.S. 741, 749 (1979).

Petitioner simply asserts that ordinarily, and especially in the entrapment context, see *Sherman* v. *United States*, *supra*, the actions and knowledge of informants are imputed to the government. Pet. 34-35. While that is true, it does not help petitioner. The Court of Military Appeals imputed Nolte's conduct and knowledge (after Nolte became an informant) to the government for purposes of adjudicating petitioner's claim of entrapment, but found that defense defeated by the obvious alacrity with which petitioner reponded to the inducement. Pet. App. D7-D8 & n.5. The court also examined the informant's conduct in adjudicating petitioner's distinct statutory and regulatory claims, but concluded that neither the CID nor the informant violated the cited provisions. The court explained that the "'information' that [the informant] provided was acquired prior to or wholly outside of any [drug-abuse] program," *id.* at D10, and petitioner's participation in a drug abuse program "had nothing to do with his selection" as a target, because "the CID agents did not at the time know [petitioner] was involved in the program, and the source identified [petitioner] because he was the only person the source knew who was involved with cocaine," *id.* at D11. That analysis did not depend on whether the informant's knowledge was imputed to the government; rather, it depended on a conclusion that the CID and the source's conduct did not infringe on the protection allowed to participants in a

drug rehabilitation program. Petitioner has offered nothing to doubt the correctness of that analysis.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN M. SMITH
Colonel, USA

LYLE D. JENTZER
Major, USA

MICHAEL E. MULLIGAN
Captain, USA
Appellate Government Counsel
Government Appellate Division

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[7] Petitioner also suggests in his concluding statement (Pet. 38-39) that his convictions should be reversed "on due process grounds," because the government's conduct was "shocking to the universal sense of justice." The questions presented by the petition, however, do not advert to or fairly include any due process issue. See Pet. i. Accordingly, that issue is not properly before this Court. See Sup. Ct. R. 14.1(a); *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 427-428 (1993) (per curiam).